IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6967 of 2002

with

SPECIAL CIVIL APPLICATION No 8546 of 2002

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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MV SUBRAMANIAN IYER

Versus

HARSHADBHAI SHAH - CHAIRMAN DALAL PARK CO OP HOU.SOC.LTD.

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Appearance:

1. Special Civil Application No. 6967 of 2002

PARTY-IN-PERSON for the Petitioner

MR RS GAJJAR for Respondent No. 1

MR UNMESH D SHUKLA for Respondents Nos. 2-5

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CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 05/03/2003

ORAL JUDGEMENT

The petitioner has appeared in person. However, on account of his old age he has been permitted to represent through his son one Mr.Natarajan.

These two petitions arise from the judgment and order dated 8th May, 2002 passed by the Gujarat State Cooperative Tribunal (hereinafter referred to as 'the Tribunal') in Appeal No.157/2001.

The dispute pertains to the right to utilise the common facilities of the society i.e. the common plot and the approach road. The society in question is the Dalal Park Cooperative Housing Society Limited (hereinafter referred to as 'the Society') situated at Maninagar in Ahmedabad. The Society is located between two public roads on the east and the west of the Society. The Society comprises 14 tenements of which the petitioner is the owner and occupant of the tenement No.8. In the middle of the Society runs an approach road connecting the public roads to the east and the west of the Society. It is the case of the Society that if both the ends of the approach road are kept open the people in the surrounding areas use the approach road as thorough fare causing inconvenience and nuisance to the residents of the Society. There may be some problems with respect to the security also. With a view to avoiding such inconvenience or nuisance and for the purposes of security, the Society has installed a gate at the eastern end of the approach road. A wicket gate has been kept open for an individual to pass through.

The tenement No.8 is situated in the north-east corner of the Society. On two sides of the said tenement No.8, leaving the margin land, is the compound wall of the Society, the petitioner has constructed walls over the other two sides namely, the western and the southern sides of the said tenement so as to have a secluded piece of land for his personal convenience. On account of construction of the compound wall on all the four sides of the tenement No.8, the only access to the tenement No.8 is from the public road to the east of the Society. In other words, the occupants of the tenement No.8 do not have a direct access to the approach road. Ordinarily, the said occupants would use the eastern end of the approach road to enter the Society either for the use of the approach road or for the use of the common plot. However, since the gates are kept closed, the occupants of the tenement No.8 are deprived of such facilities.

Feeling aggrieved, the petitioner had preferred Arbitration Suit No.506/1999 in the Court of Board of Nominees, Ahmedabad.

The Board of Nominees, keeping in view the interest of the petitioner and the other members of the Society, under its judgment and order dated 20th February, 2001, directed that the key to the gate shall be given to the petitioner so as to enable the petitioner and his family to use the said entrance to the Society. Feeling aggrieved, the petitioner preferred the Appeal No.157/2001 before the Tribunal. Under the judgment and order dated 8th May, 2002, the said Appeal was partially allowed. The Society has been directed to keep the disputed gate open in the morning from 9:00 to 12:00 and in the afternoon from 5:00 to 8:00. Feeling aggrieved, the petitioner has preferred the above Special Civil Application No.6967/2002 and the Society has preferred the above Special Civil Application No.8546/2002.

Mr.Natarajan has submitted that the petitioner is the member of the Society since its inception. The petitioner and his family are residing in the said tenement No.8 for some 40 years. All along they had been using the eastern end of the approach road to enter the Society for the purpose of availing of the facility of the common plot and also to reach the public road to the west of the Society. Ever since the Society has closed the eastern end of the approach road by a gate, the petitioner and his family have been shut out of the rest of the Society. The petitioner and his family cannot pass through the wicket gate with their vehicles. The gate is closed round the clock. The petitioner and his family, therefore, have to take a long detour through slum area for reaching the public road to the west of the Society. The young children in the family of the petitioner also are unable to go to the common plot for play. Thus, the petitioner and his family are deprived of the common facilities which the Society is bound to provide to the petitioner. The said right of the petitioner has, thus, been infringed. The Society is, therefore, required to be directed to keep the gate open so as to enable the petitioner and his family to use the approach road with their vehicles. Mr.Natarajan has further submitted that keeping the gate open for limited hours is not enough to mitigate the hardship suffered by the petitioner and his family.

The learned advocate Mr.Shukla has submitted that the margin land along all the tenements of the Society belongs to the Society and it is intended for common use

by all the members of the Society. However, in the present case, the occupants of the tenements Nos.7 and 8 have constructed compound walls in the said margin land so that both the said tenements have their separate margin land and the privacy. It is on account of construction of these walls by the concerned members that the occupants of the tenement No.8 have been secluded from the rest of the Society. The only access the petitioner is left with is to the public road to the east of the Society. If the entrance to the approach road towards the east is kept open so as to accommodate the petitioner and his family it should cause inconvenience and nuisance to the rest of the members of the Society. In the submission of Mr.Shukla, this problem has arisen on account of the construction of the compound walls by the petitioner and the owner of the tenement No.7 one Shri Bhavanilal B.Mathur. Mr.Shukla has submitted that the petitioner having closed the access to the rest of the Society for his personal benefit cannot now complain or demand that the eastern end of the approach road should be kept open for the use by him and his family.

At the suggestion made by the Court, the Society had explored the possibility of the owner and the occupant of the tenement No.7 to allow the petitioner and his family to use the margin land for access to the approach road. In answer, the said Shri Bhavanilal Mathur had appeared before this Court and had submitted his affidavit. In the said affidavit, Shri Bhavanilal Mathur has stated that he is the owner and the occupant of the said tenement No.7. He is agreeable to remove the compound wall constructed by him between the compound wall of the Society and his tenement so as to allow an access to the approach road for the petitioner and his family.

In answer, Mr.Natarajan has read out the affidavit made by the petitioner. It is suggested that the petitioner has full grown trees in his compound, which cannot be removed. Unless the said trees are removed the passage to the approach road by the side of the tenement No.7 can not be opened. A doubt has been raised with respect to the bonafide of the said Shri Bhavanilal Mathur also. It is also suggested that the trees cannot be removed unless the Municipal Corporation allows the petitioner to remove the said trees. He has also disputed that the margin land belongs to the Society.

To me it appears that the grievance of the petitioner is genuine and requires to be redressed. The

petitioner being the member of the Society has a right to use all the common facilities provided by the Society. However, the objection raised by the Society is equally genuine. If the approach road is open for access from both the sides, it would be used by the people residing in the locality as a thorough fare causing inconvenience and nuisance to the residents of the Society and may also cause the security problems. Moreover, the objection of the petitioner against opening the access through the margin land seems to be frivolous. By opening such access, the petitioner would not lose the benefit of his secluded plot of land i.e. he would still be able to use the margin land as he has been doing for several years. It is the said Bhavanilal Mathur who should lose the benefit of using the margin land for his exclusive purpose. If the said Bhavanilal Mathur has no objection against the petitioner and his family using the margin land along his tenement No.7 for access to the approach road, the objection raised by the petitioner shall not be sustainable. The petitioner though can have a direct access to the approach road through the margin land along the tenement No.7, his insistence on keeping the gate in question open for the use by him and his family is not justiciable.

In above circumstances, in my view, the dispute can be amicably resolved if the compound walls constructed in the margin land between the compound wall of the Society and the tenements Nos.7 and 8 are removed by the concerned owners. It is, therefore, directed that the petitioner will remove the compound wall constructed by him towards the east of his tenement between the tenement and the compound wall of the Society. The owner and occupant of the tenement No.7 Shri Bhavanilal Mathur also shall remove the compound wall constructed by him between the tenement No.7 and the compound wall of the Society. The margin land between the tenement No.7 and the compound wall of the Society will be used as passage to the approach road by the petitioner and his family. The said Shri Bhavanilal Mathur and his family shall not cause any hindrance or obstruction to the petitioner and his family using the said margin land for passage to the approach road with the two wheeler vehicles. The said Bhavanilal Mathur shall remove the wall between the tenement No.7 and the compound wall of the Society within seven days from the date the petitioner removes the compound wall between the tenements Nos.7 and 8 on the east of the said tenements.

Subject to the above directions, both these petitions are disposed of. The impugned judgment and

order of the Tribunal shall stand modified in consonance with the above directions. Rule nisi issued in each of these petitions is made absolute to the above extent. The parties shall bear their own costs.

In the event of any difficulty in executing this order, either of the parties or the above referred Shri Bhavanilal Mathur shall have liberty to move this Court.

( Ms. R.M. Doshit, J. )

/sakkaf